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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 844

FLOYD B. HARMON,
Petitioner,
v.
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR REHEARING

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Pursuant to Rule 58 of the Revised Rules of the Supreme Court of the United States, petitioner in the above captioned cause requests the Court to review its order of March 15, 1965 denying Certiorari and that it reconsider Questions I and II. For his grounds, petitioner calls to the Court's attention the decision of the United States Court of Appeals for the Fifth Circuit in *San Fratello v. U.S.*, 340 F. 2d 560, decided on January 20, 1965, subsequent to the filing of the petition for Writ of Certiorari and reported March 8, 1965.

The questions presented in the case are almost identical to Questions I and II in the instant case. The Court there stated the questions as follows:

> "The only questions presented here which merit discussion arose out of the action of the Court in permitting the prosecution to call San Fratello's wife as a witness so as to require her to claim her privilege against self-incrimination in the presence of the jury, after it had been known to the Court in the absence of the jury that the witness had claimed her privilege as to the same matters in a previous trial and that she had just advised the prosecutor that she would assert it in this case. *The questions are whether it was error to overrule San Fratello's objection to her being required to claim her privilege in the presence of the jury, and if so, whether the error was rendered harmless by the Court's instruction to the jury in connection with the matter.*" (340 F.2d 560, 562) (emphasis added).

The Court held that it was error to allow the witness to claim her privilege in the presence of the jury in the circumstances of the case, and, further, that this error was not rendered harmless or corrected by the Court's instructions to the jury concerning the plea of privilege of the Fifth Amendment submitted by the witness. It is submitted that this holding is in direct conflict with the decision of the Sixth Circuit Court of Appeals in the instant case wherein it was held that the privilege could be asserted before the jury and that in any event an instruction cures the error, if any there may be.

The *San Fratello* decision also conflicts with the decision in the instant case in one further particular which demonstrates the need for this Court to affirmatively determine the proper procedures to be followed in such cases. The Fifth Circuit decision makes it very clear that

the circumstances require a separate hearing in the absence of the jury. When the parties know, or should reasonably know, that certain witnesses intend to refuse to answer questions on the ground of privilege against self-incrimination, and this is communicated to the Court, it is necessary to call and examine them in the absence of the jury. It can then be determined to what extent they intend to claim privilege and whether or not such claim is valid. The opinion also makes clear that it is incumbent upon the Court to make such investigation to avoid the inevitable effect of such an examination before the jury.

The Sixth Circuit makes it equally clear that no such procedure is necessary and that any error resulting therefrom may be cured by a proper instruction to the jury. It held the Court has no right to preclude either party from calling witnesses. It further held the Court has the opportunity to pass upon the issue only after the witnesses are called and the questions put to them, and they invoke their privilege. All this may be done in the presence of the jury.

The *San Fratello* decision further stated,

> "Even in the face of this inevitable inference, it may well be proper in some cases to have the proceeding in the presence of the jury where the government is dealing with what has sometimes been called the 'ordinary' witness; that is, with one not so closely connected with the defendant by the facts of the case, the pleadings, or relationship that the inference of the witness' guilt would likely be imputed to the defendant. The circumstances could be such that the jury would naturally expect the witness to be called. But a defendant's spouse or a co-defendant would not come within that category." (P 565.)

The exception as above stated was found not to be applicable in the facts of that case.

The instant case does not fall within the exception stated above concerning the "ordinary" witness. The petitioner was the Secretary-Treasurer of the Local Union. The witnesses held the offices of Vice-President, Business Agent and Organizer of the same Local. The two-fold inference to be drawn by a layman from their claims of privilege is that (1) they were a confession of crime, and (2) that the crime was involved in the allegations against the defendant. They were, therefore, so closely connected with the petitioner by the facts, pleadings and relationship, that the inference of their guilt would be imputed to the petitioner. The jury could not have inferred the witnesses were guilty without concluding that it was through participation with the petitioner in his alleged crime.

The Court in this case did not concern itself with the purpose behind the prosecution's calling the witnesses. It merely stated the prosecution's contention that the defendant did not have a right to hand pick the witnesses and that the prosecution had a duty to resort to all sources of supplying information. The Court did state that the testimony of the three witnesses was not needed.

The circumstances here were not "such that the jury would naturally expect the witnesses to be called," as was held by the Fifth Circuit to be a possible justification for calling them. If the witnesses had not been called by either side, the jury might equally have inferred that the petitioner did not call them because their testimony would not support his defense as that the prosecution did not call them because it would have supported his defense.

This fact, coupled with the Appellate Court's statement that their testimony was not needed leads to the same con-

clusion as the Fifth Circuit reached, namely, that there was no purpose in calling them and requiring them to claim their privilege against self-incrimination other than to use their conduct as an incriminating circumstance against the petitioner. Their claim of self-incrimination in refusing to disclose their knowledge of petitioner's use of the boat on union business put the stamp of criminality on his conduct. This conclusion is strengthened by the fact that the validity of their claim of privilege was never challenged nor ruled upon in a single instance.

It is apparent that the Fifth and Sixth Circuit Courts differ markedly in their approach to the problem of procedure to be employed in a situation where the prosecution or defense counsel advise the Court that a witness is going to interpose a plea of self-incrimination rather than answer any question. The Fifth Circuit quite obviously holds that the Court has an affirmative duty to protect the accused from the prejudicial effect of circumstances such as the ones here against which he has no means of protecting himself. The Sixth Circuit interprets the role of the Court to be a more passive, formalized one of attempting to overcome any prejudice created by proper instructions. The Court has no duty to determine by a separate hearing the validity and extent of the privilege and to exclude the witness or certain questions if the effect of repeating it before the jury will be unduly prejudicial to the accused. It apparently would only require the Court to react, rather than act affirmatively.

It is submitted that the two decisions present a substantial conflict. One holds that the Court must determine out of the presence of the jury the validity and extent of a witness' privilege to refuse to testify and that failure to do so can not be cured by an instruction. The other holds the Court has no duty of affirmative action and that any

prejudice resulting from the privilege being elicited in the jury's presence may be cured by an instruction. Such a substantial conflict requires this Court to consider and determine the proper procedures to be followed.

For the foregoing reasons, petitioner requests the Court to vacate its earlier order denying certiorari and grant certiorari to petitioner on Questions I and II.

Respectfully submitted,

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